APPENDIX A

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 06-14726

D.C. Docket No. 06-00394-CV-CAP-1

PHOENIX OF BROWARD, INC.,
On behalf of Itself and Similarly
Situated Burger King Franchisees,
1101 S. Rogers Circle, Suite 10,
Boca Raton, Florida 33487,

Plaintiff-Appellant,

versus

MCDONALD'S CORPORATION,
One McDonald Plaza, Oak Brook,
Illinois 60523,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Georgia

(June 22, 2007)

FILED
U.S. COURT OF APPEALS, ELEVENTH CIRCUIT
JUNE 22, 2007
THOMAS K. KAHN, CLERK

Before PRYOR, KRAVITCH and ALARCON,* Circuit Judges.

KRAVITCH, Circuit Judge:

The primary issue in this appeal is the proper test for determining whether a party has prudential standing to bring a false advertising claim under § 43(a) of the Lanham Act, 15 U.S.C. § 1125(a). Phoenix of Broward, Inc. ("Phoenix") appeals the district court's dismissal of its false advertising claim against McDonald's Corporation ("McDonald's") for lack of prudential standing. For the reasons that follow, we adopt the test for prudential standing set forth in *Conte Bros. Automotive, Inc. v. Quaker State-Slick 50, Inc.*, 165 F.3d 221, 225 (3d Cir. 1998), and affirm the district court's dismissal.

I. BACKGROUND

Burger King Corporation ("Burger King") owns, operates, and franchises fast food restaurants throughout the world. Today, there are approximately 11,000 Burger King restaurants worldwide. Appellant Phoenix is a licensed Burger King franchisee that owns and operates a Burger King franchise in Fort Lauderdale, Florida. McDonald's, like Burger King, owns, operates, and franchises fast food restaurants throughout the world, and there are approximately 30,000 McDonald's restaurants worldwide. As competitors in the fast food industry, both McDonald's and Búrger King have employed a variety of marketing

---

* Honorable Arthur L. Alarcon, United States Circuit Judge for the Ninth Circuit, sitting by designation.

and promotional strategies to attract customers, generate sales, and ensure customer loyalty.

From 1995 to August 2001, McDonald's offered customers the opportunity to participate in various promotional games such as "Monopoly Games at McDonald's," "The Deluxe Monopoly Game," "Who Wants to be a Millionaire," and "Hatch, Match and Win." Each of the promotional games featured low-value, mid-value, and high-value prizes. The low-value prizes included low-dollar cash awards and food and beverage items, while the high-value prizes included automobiles and cash awards of up to $1 million dollars. In general, customers could win the $1 million grand prize in one of two ways—by obtaining one of the rare $1 million, instant-winner game pieces *or* by collecting and matching a combination of certain other game pieces.

McDonald's conducted an extensive advertising and marketing campaign for each of the games it offered. In these advertisements, McDonald's represented that all customers who participated in the games had a fair and equal opportunity to win the offered prizes. The advertisements also represented the specific odds of winning certain prizes, including the high-value prizes.

In approximately April 2000, the Federal Bureau of Investigation ("FBI") began investigating the promotional games. While the games were still underway, the FBI informed McDonald's that there were problems with the random distribution of its game pieces. In spite of this alleged knowledge, McDonald's continued to advertise that customers had a fair and equal opportunity to win the offered prizes, including the high-value prizes.

On August 21, 2001, the United States Department of Justice ("DOJ") and the FBI announced that between 1995 and August 2001, certain of McDonald's promotional games had been compromised by a criminal ring led by an employee of Simon Marketing, Inc. ("Simon"), the company McDonald's engaged to operate the promotional games. From approximately 1995 to August 2001, Simon's Director of Security, Jerome Jacobson, diverted at least $20 million in high-value prizes by embezzling winning, high-value game pieces and distributing them to a network of "winners" who claimed (or recruited others to claim) the prizes from McDonald's. The DOJ and FBI announced that eight individuals, including Jacobson, had been arrested in connection with the scheme. In announcing the arrests, the U.S. Attorney General stated that the "fraud scheme denied McDonald's customers a fair and equal chance of winning." In a corporate press release issued after the arrests, McDonald's Chairman and Chief Executive Officer described the scheme as "a highly sophisticated inside game of fraud and deception."

On or about April 5, 2002, Jacobson pleaded guilty to charges of conspiracy and mail fraud. Approximately 50 other persons either pleaded guilty or were convicted in connection with the conspiracy.

Following the disclosure of the scheme, McDonald's created an independent task force to review all of its promotional practices, and it introduced additional security procedures to ensure the integrity of future promotional games. Nonetheless, consumers throughout the U.S. filed several class actions against McDonald's, alleging

consumer fraud, negligence, and unjust enrichment. On April 19, 2002, McDonald's settled these class actions by, *inter alia*, agreeing to implement a $15 million "Instant Giveaway," providing class members and the general public an opportunity to win fifteen $1 million prizes.

On February 22, 2006, Phoenix filed the instant action against McDonald's on behalf of itself and all similarly situated Burger King franchisees (a proposed class of approximately 1,100 franchisees), alleging false advertising in violation of § 43(a) of the Lanham Act. Specifically, Phoenix alleged that McDonald's misrepresented that each player in its promotional games had a fair and equal chance of winning high-value prizes and misrepresented the specific odds of winning high-value prizes. According to Phoenix, McDonald's promotional games were "rigged from approximately 1995-2001," those games lured customers away from Burger King and yielded an "unnatural" spike in profits for McDonald's, the high-value prizes (including the $1 million prizes) were diverted from McDonald's customers, and the "advertising campaigns that touted million dollar prizes were literally false." Phoenix also alleged that after learning that the games had been compromised, McDonald's knowingly and deliberately continued to advertise the games as though customers had a fair and equal chance of winning.

McDonald's moved to dismiss Phoenix's complaint on the grounds that Phoenix lacked prudential standing under the Lanham Act and, in the alternative, that Jacobson's theft was an intervening cause of Phoenix's alleged injury. On August 1, 2006, the district court issued a written order granting McDonald's motion and dismissing the

action with prejudice. Noting that the Eleventh Circuit had not addressed the appropriate standard for determining whether a plaintiff has prudential standing to bring a false advertising claim under § 43(a) of the Lanham Act, the district court surveyed the case law of other circuits and adopted the five-factor test set forth by the Third Circuit in *Conte Bros.*, 165 F.3d at 225, finding that test to be more "persuasive" than the "categorical approach" adopted by several other circuits. Applying the *Conte Bros.* test, the district court concluded that Phoenix did not have prudential standing to bring a false advertisement claim under the Lanham Act against McDonald's. Phoenix now appeals.

II. DISCUSSION

On appeal, Phoenix argues that the district court erred in dismissing its complaint against McDonald's for lack of prudential standing. "We review standing determinations *de novo*." *Bochese v. Town of Ponce Inlet*, 405 F.3d 964, 975 (11th Cir. 2005). "We review a district court's grant of a motion to dismiss *de novo*, taking as true the facts as they are alleged in the complaint." *Owens v. Samkle Auto. Inc.*, 425 F.3d 1318, 1320 (11th Cir. 2005).

"In every federal case, the party bringing the suit must establish standing to prosecute the action." *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11, 124 S.Ct. 2301, 2308, 159 L.Ed.2d 98 (2004). As the Supreme Court has explained, standing jurisprudence is comprised of "two strands: Article III standing, which enforces the Constitution's case-or-controversy requirement, and prudential standing, which embodies judicially self-imposed limits on the exercise of federal jurisdiction." *Id.* at 11-12, 124

S.Ct. at 2308 (internal quotation marks and citation omitted).

To demonstrate Article III standing, a plaintiff must allege that (1) he has suffered an actual or threatened injury, (2) the injury is fairly traceable to the challenged conduct of the defendant, and (3) the injury is likely to be redressed by a favorable ruling. *Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward County*, 450 F.3d 1295, 1304 (11th Cir. 2006).

McDonald's does not dispute that the allegations in Phoenix's complaint satisfy these constitutional standing requirements. Because the issue of constitutional standing is jurisdictional, however, we address it here. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 91-93, 118 S.Ct. 1003, 1011, 140 L.Ed.2d 210 (1998) (stating that the question of Article III standing is jurisdictional and should be addressed before issues of prudential and statutory standing); *Conte Bros.*, 165 F.3d at 225.

In its complaint, Phoenix alleges that "[a]s a direct and proximate result of McDonald's false . . . advertising and unfair competition, customers were diverted from Phoenix and its Affiliated Franchisees, who accordingly not only lost profits due, *inter alia*, to reduced sales, but also incurred costs in connection with common counteractive efforts to retain those customers." Although Phoenix does not allege that McDonald's or any of its employees participated in the theft that led to the compromising of the high-value games (allegedly rendering McDonald's advertisements false), Phoenix does allege that after McDonald's learned that the high-value games had been

compromised, it knowingly and deliberately advertised that customers had a fair and equal opportunity to win high-value prizes. These allegations satisfy the first two prongs of the constitutional standing inquiry—Phoenix alleges that it has suffered an actual injury that is fairly traceable to McDonald's alleged misconduct. *See Primera Iglesia*, 450 F.3d at 1304. In relief, Phoenix requests, among other things, "actual damages, in amounts to be demonstrated at trial for the harms directly and proximately caused by McDonald's false . . . advertising" and "other damages incurred," including "advertising costs incurred to respond to the fixed promotional games." If granted, this relief would redress the injuries alleged and thus satisfies the third prong of the standing inquiry. *See id.* Based on the allegations in the complaint, we conclude that Phoenix has satisfied the requirements of constitutional standing.

Even where constitutional standing exists, however, prudential considerations may preclude standing. *Wooden v. Bd. of Regents of Univ. Sys. of Ga.*, 247 F.3d 1262, 1273 n.12 (11th Cir. 2001). We therefore turn to the issue of prudential standing.

A. Whether Prudential Standing Doctrine Applies to the Lanham Act

We must first determine whether Congress intended to abrogate prudential standing doctrine in passing § 43(a) of the Lanham Act. Section 43(a) provides:

> (1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce

> any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which—
>
> (A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or
>
> (B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities,
>
> shall be liable in a civil action *by any person who believes that he or she is or is likely to be damaged* by such act.

15 U.S.C. § 1125(a) (emphasis added).

The issue of whether prudential standing doctrine applies to § 43(a) of the Lanham Act is one of first impression in this circuit. The Third and Fifth Circuits have addressed this question, and both have held that Congress did not abrogate prudential limitations on the standing of plaintiffs to bring suit under § 43(a). *See Conte Bros.*, 165 F.3d at 227-230; *Procter & Gamble Co. v. Amway Corp.*, 242 F.3d 539, 561-62 (5th Cir. 2001). We agree.

Congress is presumed to incorporate background prudential standing limitations unless

the statute expressly negates such principles. *Bennett v. Spear*, 520 U.S. 154, 163, 117 S.Ct. 1154, 1162, 137 L.Ed.2d 281 (1997). Although § 43(a)'s use of the term "any person" might lead to the conclusion that Congress intended to negate the background of prudential standing by allowing "any person" who could achieve Article III standing to bring suit, "the Supreme Court has twice held that Congress has not expressly abrogated prudential standing doctrine merely by passing a statute the text of which admits a broad interpretation." *Conte Bros.*, 165 F.3d at 227. For example, in *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, the Supreme Court held that Congress did not abrogate prudential standing principles when it enacted the Clayton Act, despite statutory language allowing "[a]ny person who shall be injured in his business or property" to bring suit under that act. 459 U.S. 519, 535 & n.31, 103 S.Ct. 897, 907 & n.31, 74 L.Ed.2d 723 (1983). And as noted by the courts in *Conte Bros.* and *Procter & Gamble*, language contained in § 45 of the Lanham Act "makes clear that the focus of the [Lanham Act] is on anti-

competitive conduct in a commercial context,"[1] so that conferring standing to the full extent implied by the plain language of § 43(a) would give standing to parties that have *not* had their competitive or commercial interests affected by the defendant's conduct. *Conte Bros.*, 165 F.3d at 229; *Procter & Gamble*, 242 F.3d at 561. Rather, "[t]he congressionally-stated purpose of the Lanham Act" evinces a congressional "intent to limit standing to a narrow class of potential plaintiffs possessing interests the protection of which furthers" that congressionally stated purpose. *Conte Bros.*, 165 F.3d at 229.

Accordingly, in light of the text of § 43(a) and the purpose of the Lanham Act as expressed in § 45, we join the Third and the Fifth Circuits and hold that Congress did not intend to abrogate prudential standing limitations when it enacted the Lanham Act.

---

[1] Section 45 provides in pertinent part:

> The intent of this chapter is to regulate commerce within the control of Congress by making actionable the deceptive and misleading use of marks in such commerce; to protect registered marks used in such commerce from interference by State, or territorial legislation; *to protect persons engaged in such commerce against unfair competition*; to prevent fraud and deception in such commerce by the use of reproductions, copies, counterfeits, or colorable imitations of registered marks; and to provide rights and remedies stipulated by treaties and conventions respecting trademarks, trade names, and unfair competition entered into between the United States and foreign nations.

15 U.S.C. § 1127 (emphasis added).

B. The Appropriate Test for Prudential Standing Under § 43(a)

Phoenix argues that the district court applied the wrong test to determine whether Phoenix had prudential standing to bring its false advertising claim against McDonald's. According to Phoenix, the district court erred in applying the five-factor test articulated by the Third Circuit in *Conte Bros.*, and instead, the court should have applied the "categorical approach" that, according to Phoenix, "controls in most" of the circuit courts of appeals.

This court has not addressed the appropriate test for determining whether a plaintiff has prudential standing to bring a false advertising claim under § 43(a) of the Lanham Act. After surveying the caselaw from other circuits and examining the parties' arguments, we join the Third and Fifth Circuits and adopt the test for prudential standing articulated in *Conte Bros.*[2] We therefore hold that to determine whether a party has prudential standing to bring a false advertising claim under § 43(a) of the Lanham Act, a court should consider and weigh the following factors:

> (1) The nature of the plaintiff's alleged injury: Is the injury of a type that Congress sought to redress in providing a private remedy for violations of the

---

[2] To date, the Third and Fifth Circuits are the only circuits to have adopted the test set forth in *Conte Bros. Automotive, Inc. v. Quaker State-Slick 50, Inc.*, 165 F.3d 221, 233 (3d Cir. 1998), as the standard for determining whether a plaintiff has prudential standing under § 43(a) of the Lanham Act. *See Am. Ass'n of Orthodontists v. Yellow Book USA, Inc.*, 434 F.3d 1100, 1104 (8th Cir. 2006).

> [Lanham Act]?
> (2) The directness or indirectness of the asserted injury.
> (3) The proximity or remoteness of the party to the alleged injurious conduct.
> (4) The speculativeness of the damages claim.
> (5) The risk of duplicative damages or complexity in apportioning damages.

Conte Bros., 165 F.3d at 233 (internal quotation marks and citations omitted);[3] *Procter & Gamble*, 242 F.3d at 562 (adopting the *Conte Bros.* test for determining prudential standing under the Lanham Act). We believe that this test "provides appropriate flexibility in application to address factually disparate scenarios that may arise in the future, while at the same time supplying a principled means for addressing standing under . . . § 43(a)." *Conte Bros.*, 165 F.3d at 236. Indeed, "two prominent commentaries" have endorsed this standard. *Procter & Gamble*, 242 F.3d at 562 n.51 (citing 4 McCarthy, McCarthy on Trademarks and Unfair Competition § 27:32 n.1 (4th ed. 1996) ("In the author's opinion, some limit on the § 43(a) standing of persons remote from the directly impacted party should be applied by analogy to antitrust law, such as use of the criteria listed in *Associated General Contractors* . . . ."); Restatement (Third) of Unfair Competition § 3 cmt.f (1995) ("In determining whether an asserted injury is sufficiently direct to justify the imposition of liability, the Supreme Court's analysis of similar issues under

---

[3] In announcing this standard, the Third Circuit adopted the test for standing under the Sherman Act articulated by the Supreme Court in *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 103 S.Ct. 897, 74 L.Ed.2d 723 (1983). *Conte Bros.*, 165 F.3d at 233.

federal antitrust law may offer a useful analogy.")). And under this standard, "standing under the Lanham Act does not turn on the label placed on the relationship between the parties." *Conte Bros.*, 165 F.3d at 235.

Phoenix argues that this court should adopt the so-called "categorical approach" that is applied in the majority of the circuits, as under that approach, "actual" or "direct" competition is the "exclusive requirement" for determining prudential standing. To that end, Phoenix argues that the *Conte Bros.* test was formulated in order to extend prudential standing under the Lanham Act to parties who are *not* in "actual" or "direct" competition. Thus, according to Phoenix, the *Conte Bros.* factors "inevitably collapse" into the categorical approach when applied to a "direct competitor" alleging a "competitive injury," and therefore, direct competitors "invariably satisfy" the *Conte Bros.* requirements. We address each argument in turn.

Of the circuits that have not adopted the *Conte Bros.* test, the Seventh, Ninth, and Tenth Circuits have come the closest to "categorically" holding that the plaintiff must be in "actual" or "direct" competition with the defendant and assert a "competitive injury to establish prudential standing under § 43(a)."[4] *See, e.g.*, *Jack Russell Terrier*

---

[4] Contrary to Phoenix's contention, it appears that the Fourth Circuit has not adopted the so-called categorical approach followed in the Seventh, Ninth, and Tenth Circuits. In *Made in the USA Foundation v. Phillips Foods, Inc.*, the Fourth Circuit stated that "in an earlier case involving commercial parties, we noted in passing that the Lanham Act is 'a private remedy [for a] commercial plaintiff who meets the burden of proving that its commercial interests have been harmed by a competitor's false advertising.'" 365 F.3d 278, 281 (4th Cir.

Network of N. Ca. v. Am. Kennel Club, Inc., 407 F.3d 1027, 1037 (9th Cir. 2005) (holding that to establish "standing pursuant to the 'false advertising' prong of § 43(a) of the Lanham Act, a plaintiff must show: (1) a commercial injury based upon a misrepresentation about a product; and (2) that the injury is 'competitive,' or harmful to the plaintiff's ability to compete with the defendant" (citation omitted)); *Hutchinson v. Pfeil*, 211 F.3d 515, 520 (10th Cir. 2000) (holding that the plaintiff lacked standing because his hopes of eventually obtaining a product to compete with the defendant's were too remote, and his inability to compete with the defendant was not a function of the defendant's alleged misconduct); *Johnny Blastoff, Inc. v. L.A. Rams Football Co.*, 188 F.3d 427, 438 (7th Cir. 1999) (holding that "a party

---

2004) (quoting *Mylan Labs., Inc. v. Matkari*, 7 F.3d 1130, 1139 (4th Cir. 1993)) (emphasis added). And after examining opinions from the First, Second, Third, Seventh, and Tenth Circuits, the Fourth Circuit acknowledged that "there might be some marginal differences in the circuits about what qualifies as a commercial or competitive interest for standing purposes under the Lanham Act" and determined that "the basic approach of other circuits . . . requires the Lanham Act plaintiff to be engaged in commercial activity." *Id.* at 280-81 (examining *Conte Bros.*, 165 F.3d at 229; *Stanfield v. Osborne Indus., Inc.*, 52 F.3d 867, 873 (10th Cir. 1995); *Dovenmuehle v. Gilldorn Mortgage Midwest Corp.*, 871 F.2d 697, 700 (7th Cir. 1989); *Berni v. Int'l Gourmet Rests. of Am., Inc.*, 838 F.2d 642, 648 (2d Cir. 1988); *Camel Hair & Cashmere Inst. of Am., Inc. v. Associated Dry Goods Corp.*, 799 F.2d 6, 11-12 (1st Cir. 1986)). The court endorsed this "basic approach," and as a result, it concluded that a consumer does not have standing to sue for false advertising under the Lanham Act. *Id.* at 281. Thus, rather than adopt the categorical approach followed by the Seventh, Ninth, and Tenth Circuits, the Fourth Circuit endorsed the "basic approach" of requiring that the plaintiff be engaged in commercial activity—an approach followed by all circuits that have addressed the issue. *Id.*

must demonstrate that it has a reasonable interest to be protected against conduct violating the Act[,]" by asserting "a discernable competitive injury" (internal quotations omitted)); *Stanfield v. Osborne Indus., Inc.*, 52 F.3d 867, 873 (10th Cir. 1995) (holding that the plaintiff "must be a competitor of the defendant and allege a competitive injury"); *L.S. Heath & Son, Inc. v. AT&T Info. Sys., Inc.*, 9 F.3d 561, 575 (7th Cir. 1993) (holding that "the plaintiff must assert a discernible competitive injury"); *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1109 (9th Cir. 1992) (same).

In contrast to the Seventh, Ninth, and Tenth Circuits, the First and Second Circuits have applied a less categorical approach to determine standing, wherein the dispositive issue is not the degree of "competition," but whether the plaintiff has a "reasonable interest" to be protected against the type of harm that the Lanham Act is intended to prevent. *See, e.g., Ortho Pharm. Corp. v. Cosprophar, Inc.*, 32 F.3d 690, 694 (2d Cir. 1994); *Camel Hair & Cashmere Inst., Inc. v. Associated Dry Goods Corp.*, 799 F.2d 6, 11 (1st Cir. 1986). In *Camel Hair*, a trade group of cashmere garment producers filed a Lanham Act suit alleging that a coat manufacturer had misrepresented the cashmere content of one of its products. 799 F.2d at 6-8. In discussing the issue of standing, the First Circuit said: "the plaintiff [must have] a *reasonable interest* in being protected [against false advertising]. . . . [I]t is [not enough] for the plaintiff merely to establish a falsehood in the defendant's advertising or marketing; the plaintiff must also show a link or 'nexus' between itself and the alleged falsehood." *Id.* at 11-12 (emphasis added). Concluding that the trade group had standing, the First Circuit stated that "[although] *none* of the [group's] members *compete with the*

defendant . . . their position as manufacturers and vendors of fabric and clothing containing cashmere *gives them a strong interest* in preserving cashmere's reputation as a high quality fibre." *Id.* at 12 (emphasis added).

In the Second Circuit, a plaintiff bringing a false advertising claim under the Lanham Act "must demonstrate both (1) a reasonable interest to be protected against the advertiser's false or misleading claims, and (2) a reasonable basis for believing that this interest is likely to be damaged by the false or misleading advertising." *ITC Ltd. v. Punchgini, Inc.*, 482 F.3d 135, 169 (2d Cir. 2007) (internal quotation marks omitted); *accord Societe Des Hotels Meridien v. LaSalle Hotel Operating P'ship, L.P.*, 380 F.3d 126, 130 (2d Cir. 2004); *Havana Club Holding, S.A. v. Galleon S.A.*, 203 F.3d 116, 130 (2d Cir. 2000); *PDK Labs, Inc. v. Friedlander*, 103 F.3d 1105, 1111 (2d Cir. 1997). "The reasonable interest prong of this test includes commercial interests, direct pecuniary interests, and even a future potential for a commercial or competitive injury[,]" while "the reasonable basis prong requires the plaintiff to show *both* likely injury *and* a *causal nexus* to the false advertising." *ITC*, 482 F.3d at 169-70 (internal quotation marks omitted) (emphasis added). And under the Second Circuit's approach, a plaintiff asserting a false advertising claim under § 43(a) need not be a "competitor." *See PDK Labs*, 103 F.3d at 1111; *Ortho*, 32 F.3d at 694; *Berni v. Int'l Gourmet Rests. of Am., Inc.*, 838 F.2d 642, 648 (2d Cir. 1988). Instead, "where the plaintiff's products are not obviously in competition with [the] defendant's products," the "plaintiff must make a more substantial showing of injury and causation." *PDK Labs*, 103 F.3d at 1111 (quotation marks omitted).

Thus, contrary to Phoenix's assertions, the majority of the circuits do not hold "categorically" that actual or direct competition is the exclusive requirement for standing to bring a false advertising claim under the Lanham Act.[5]

We also disagree with Phoenix's assertion that the Third Circuit adopted the *Conte Bros.* test to "extend prudential standing" to parties who are not in "direct" or "actual" competition. In determining the appropriate test for prudential standing under § 43(a), the *Conte Bros.* court first noted that the Third Circuit's previous cases addressing § 43(a)'s standing requirements "defined the dispositive question of a party's prudential standing as whether the party has a *reasonable interest* to be protected against false advertising." *Conte Bros.*, 165 F.3d at 230 (internal quotation marks omitted) (emphasis added). Although the court had "never precisely defined the critical term 'reasonable interest,'" it had "carried forward this prudential 'reasonable interest'

---

[5] Phoenix further contends that the district court erroneously framed the *Conte Bros.* test and the "categorical approach" as "opposite sides of a circuit split coin." Although we agree that the *Conte Bros.* test and the categorical approach are not necessarily on opposite sides of a circuit split, we nonetheless conclude that there is tension between the two approaches with regards to the degree of actual competition required between the plaintiff and the defendant. *See, e.g., Am. Ass'n of Orthodontists*, 434 F.3d at 1103-04 (recognizing differences between circuits that "have held, categorically, that false advertising claims not involving misuse of a trademark are actionable only when brought by competitors of the wrongdoer[,]" and those circuits that "have adopted a less categorical multi-factor test . . . that focuses judicial enforcement of the Lanham Act on the protection of commercial interests and the prevention of competitive harm" (internal quotation marks omitted)).

requirement and ha[d] grappled with defining the term with greater precision." *Id.* at 230-31. In adopting the five-factor test discussed above, the court expressly declined to adopt standards conferring standing only on "direct competitors or their surrogates," as such standards were "in tension" with language from a previous Third Circuit opinion which implied that parties "not in direct competition" may nonetheless "have standing to sue if they have a reasonable interest to be protected against false advertising." *Id.* at 232 (citing *Serbin v. Ziebart Int'l Corp.*, 11 F.3d 1163, 1176-77 (3d Cir. 1993)) (internal quotation marks omitted). The court also cited earlier cases from the First and Second Circuits that recognized standing for Lanham Act plaintiffs who were *not* in direct competition with the defendant. *Id.* at 231-32 (citing *PPX Enters., Inc. v. Audiofidelity, Inc.*, 746 F.2d 120 (2d Cir. 1984) (holding that the owner of royalty streams from a music recording had standing to sue a distributor of falsely labeled music recordings); *Camel Hair*, 799 F.2d at 11 (holding that a trade association of manufacturers of cashmere fibers and fabrics, but not of finished coats, had standing to sue retailers of coats falsely labeled as containing more cashmere than they had)). Thus, even before the *Conte Bros.* decision, the Third Circuit had implied, and the First and Second Circuits had held expressly, that parties who are *not* in "direct" or "actual" competition may nonetheless have prudential standing to bring false advertising claims under the Lanham Act.

Finally, we disagree with Phoenix's contention that "direct competitors" alleging a "competitive" injury "invariably satisfy" the *Conte Bros.* requirements. Rather than blindly accept a plaintiff's allegation that it is a "competitor" that has suffered a

"competitive injury," the *Conte Bros.* test is designed to determine whether the injury alleged is the type of injury that the Lanham Act was designed to redress—harm to the plaintiff's "ability to compete" in the marketplace and erosion of the plaintiff's "good will and reputation" that has been directly and proximately caused by the defendant's false advertising. *Id.* at 234-36. Moreover, at least one federal court (in addition to the district court below) has applied the *Conte Bros.* test where the plaintiff and defendant were "direct competitors" and held that the plaintiff lacked prudential standing. *See, e.g., KIS, S.A. v. Foto Fantasy, Inc.*, 240 F. Supp. 2d 608, 610-11, 616 (N.D. Tex. 2002) (applying the *Conte Bros.* test and holding that the plaintiff, a manufacturer and operator of photo booths, lacked prudential standing to bring a false advertising claim against the defendant, also a manufacturer and operator of photo booths, even though the plaintiff and defendant were direct competitors in the photo booth industry). And even accepting Phoenix's argument, as stated above, we conclude that the *Conte Bros.* test "provides appropriate flexibility in application to address factually disparate scenarios that may arise in the future, while at the same time supplying a principled means for addressing standing under" § 43(a) of the Lanham Act. *Conte Bros.*, 165 F.3d at 236.

In summary, we hold that to determine whether a plaintiff has prudential standing to bring a false advertising claim under § 43(a) of the Lanham Act, a court must consider and weigh the five factors articulated in the *Conte Bros.* opinion.

C. Applying the *Conte Bros.* Test for Prudential Standing

Phoenix argues that it satisfied the requirements of prudential standing under the *Conte Bros.* test. After examining and weighing the *Conte Bros.* factors, we conclude otherwise.

1. Type of Injury Alleged

The first factor directs us to determine "whether the alleged injury is of a type Congress sought to redress in providing a private remedy for violations of the Lanham Act." *Procter & Gamble*, 242 F.3d at 563. As the *Conte Bros.* court noted, the focus of § 43(a) is on protecting "commercial interests [that] have been harmed by a competitor's false advertising, and in secur[ing] to the business community the advantages of reputation and good will by preventing their diversion from those who have created them to those who have not." *Conte Bros.*, 165 F.3d at 234 (alterations in original) (citation omitted).

In its complaint, Phoenix alleges that (1) McDonald's falsely advertised that customers who purchased its products had a fair and equal chance to win any of the prizes offered, including the high-value prizes; (2) during the run of the games, McDonald's experienced an "unnatural spike" in its sales while Burger King experienced a decrease in its sales; and (3) Burger King franchisees incurred counter-promotion costs in an effort to "lure back customers who frequented McDonald's while the fraudulent games were running." In our view, these allegations amount to an assertion by Phoenix that its "commercial interests" were "harmed by a

competitor's false advertising," and this is the type of harm the Lanham Act was intended to redress.[6] *See id.* at 234.

McDonald's argues that its "conduct was in no way anti-competitive" because it "was the victim of a criminal fraud scheme" perpetrated by a third party. According to McDonald's, "to the extent any of its advertising was 'false,' it was false solely because of the intervening criminal conduct of Jacobson and his coconspirators." We find this argument unavailing, however, because Phoenix alleges that McDonald's "knowingly and deliberately continued to advertise" that its customers had a "fair and equal chance" to win high-value prizes even after learning that the integrity of its promotional games had been compromised. Moreover, "[s]ection 43(a) provides a strict liability tort cause of action." *Vector Prods., Inc. v. Hartford Fire Ins. Co.*, 397 F.3d 1316, 1319 (11th Cir. 2005) ("It is well-settled that no proof of intent or willfulness is required to establish a violation of Lanham Act § 43(a) for false advertising.").

McDonald's also contends that Phoenix's alleged injuries are not competitive in nature because the challenged advertisements "did not tout the products and services of McDonald's or disparage the products and services of Burger King." We cannot

---

[6] Although the *Conte Bros.* court held that the "loss of sales" suffered by the plaintiffs in that case did not detract from their "ability to compete" and thus was not the type of injury the Lanham Act was designed to redress, the court reached this conclusion after determining that the plaintiff-retailers were not *at all* in competition with the defendant-manufacturers. *Conte Bros.*, 165 F.3d at 234. Here, by contrast, Burger King is one of McDonald's direct competitors in the fast food industry.

agree. Although the advertisements did not disparage Burger King or tout some intrinsic quality of McDonald's goods and services, the advertisements nonetheless asserted that customers who patronized McDonald's restaurants had an opportunity to win prizes, including the high-value prizes that had been stolen. Moreover, Phoenix alleges that the promotional games were sometimes "physically attached to McDonald's products."

McDonald's further contends that because Phoenix "has neither alleged nor suggested that its reputation was adversely affected by McDonald's advertising," this lack of "reputational injury" counsels against prudential standing. Although McDonald's is correct in asserting that Phoenix does not allege that its reputation was harmed by McDonald's conduct, we cannot say that the lack of alleged "reputational injury," in and of itself, directs us to conclude that Phoenix has failed to allege the type of injury that the Lanham Act was intended to redress. Again, the Lanham Act is not only designed to protect against unfair erosion of a competitor's reputation, it is *also* designed to protect "commercial interests [that] have been harmed by a competitor's false advertising," *Conte Bros.*, 165 F.3d at 234 (alteration in original), and, as stated above, Phoenix alleges such harm. We therefore conclude that the first factor weighs in favor of prudential standing.

2. Directness of the Asserted Injury

The second factor requires us to examine the "directness" with which the defendant's conduct affected the plaintiff. Phoenix alleges that by falsely advertising that customers had a fair and equal opportunity to win high-value prizes, McDonald's

lured customers to its restaurants and away from Burger King restaurants. According to Phoenix, as a direct result of these false advertisements, it lost sales and incurred additional promotional expenses in its attempts to lure back the customers it lost to McDonald's during the fraudulent promotion.

On one hand, the causal chain Phoenix alleges is similar to that of the typical false advertising claim in which a plaintiff alleges that it lost sales and/or market share as a result of the defendant's false or misleading representations about some characteristic of the defendant's product or services. For example, in *Logan v. Burgers Ozark Country Cured Hams Inc.*, the Fifth Circuit concluded that the second *Conte Bros.* factor counseled in favor of standing where the plaintiff alleged that the defendant's "literally false advertising about its own goods influenced its customers to buy its product instead of [the plaintiff's] product." 263 F.3d 447, 461 (5th Cir. 2001). In so concluding, the *Logan* court stated that the plaintiff's ability to license its products "*may have been directly affected by* [the defendant's] false advertising" about the defendant's products. *Id.* (emphasis added). And in *Procter & Gamble*, the Fifth Circuit stated that the second factor weighs in favor of standing in cases where "one competitor directly injur[es] another by making false statements about its own goods and thus influenc[es] customers to buy its product instead of the competitor's product." *Logan*, 263 F.3d at 460 (citing *Procter & Gamble*, 242 F.3d at 563).

On the other hand, the causal chain Phoenix alleges is more attenuated than that alleged in cases like *Logan*. Phoenix essentially alleges that (1) McDonald's advertisements falsely represented that

customers had a fair and equal chance to win one of the "rare" high-value prizes if those customers patronized McDonald's restaurants and played its games; (2) as a direct result of the misrepresentation regarding the high-value prizes, McDonald's lured customers who would have eaten at *Burger King* (as opposed to one of numerous other fast food competitors), causing Burger King to lose sales; and (3) but for this misrepresentation, these customers would have eaten at Burger King, even though the chances of winning one of the "rare" high-value prizes would have been minute had there been no theft, even though only "certain" high-value prizes were stolen, and even though these customers still had a fair and equal opportunity to win all of the other prizes. Accepting Phoenix's allegations as true, the causal chain linking McDonald's alleged misrepresentations about one aspect of its promotional games to a decrease in *Burger King's* sales is tenuous, to say the least.

Taking care not to conflate the prudential standing inquiry with the "materiality" element Phoenix must establish to succeed on the merits of its claim, *see Johnson & Johnson Vision Care, Inc. v. 1-800 Contacts, Inc.*, 299 F.3d 1242, 1250 (11th Cir. 2002) ("To succeed on a claim of false advertising, the plaintiff must establish that the defendant's deception is likely to influence the purchasing decision." (internal quotation marks omitted)), we conclude that the second factor counsels against prudential standing.

3. Proximity to the Allegedly Harmful Conduct

The third factor requires us to examine the proximity of the plaintiff to the allegedly harmful conduct. In examining this factor, we must determine whether there is an "identifiable class" of persons "whose self-interest would normally motivate them to vindicate the public interest" by bringing a suit. *Conte Bros.*, 165 F.3d at 234. "The existence of such a class diminishes the justification for allowing a more remote party . . . to perform the office of a private attorney general." *Joint Stock Soc'y v. UDV N. Am., Inc.*, 266 F.3d 164, 182 (3d Cir. 2001) (internal quotation marks omitted).

Here, the district court held, and McDonald's asserts on appeal, that the consumers who were denied a fair and equal opportunity to win the high-value prizes as advertised constitute an "identifiable class" of persons whose self-interest would normally motivate them to sue McDonald's regarding its false advertising. But this can be said about any false advertising claim, as the consumers who were diverted from the plaintiff's product to the defendant's product in reliance on the defendant's allegedly false advertisements would always have a natural self-interest in suing for fraud. As such, if we accept the district court's and McDonald's reasoning, this factor would never counsel in favor of prudential standing. Moreover, consumers would not be able to vindicate the public interest via the Lanham Act, as "the several circuits that have dealt with the question are uniform in their categorical denial of Lanham Act standing to consumers." *Made in the USA Found. v. Phillips Foods, Inc.*, 365 F.3d 278, 281 (4th Cir. 2004); *see also Conte Bros.*, 165 F.3d at 229 (reiterating

precedent holding that consumers lack standing under the Lanham Act and stating that a contrary conclusion would "ignore the purpose of" the Act); *Barrus v. Sylvania*, 55 F.3d 468, 470 (9th Cir. 1995) (holding that consumers lack standing to bring false advertising claims under the Lanham Act because they cannot allege either a commercial or competitive injury).

Furthermore, courts applying the *Conte Bros.* test have generally considered whether other *commercial entities* were the more appropriate parties to vindicate the competitive harm wrought by the defendant's alleged misconduct. *See, e.g.*, *Joint Stock Soc'y*, 266 F.3d at 182 (stating that Russian vodka manufacturers that exported vodka to the U.S. were better suited to bring a false advertising claim against the defendant and "were more proximate to the claimed injury" than the plaintiff-manufacturer that did not export its vodka to the U.S.); *Conte Bros.*, 165 F.3d at 235 (concluding that motor-oil manufacturers had a more concrete interest in preserving the reputation of motor oil than the plaintiffs as retailers of engine additives); *but see Procter & Gamble*, 242 F.3d at 563-64 (stating that although distributors "probably do not have standing to sue under the Lanham Act" because the Act "does not give consumers standing to sue[,]" distributors "are more immediate to the injury than is [plaintiff-manufacturer]" and "could vindicate the public interest . . . by suing for fraud"). As such, consumers "should be irrelevant to this analysis." *Ford v. NYLCare Health Plans of Gulf Coast, Inc.*, 301 F.3d 329, 338 (5th Cir. 2002) (Benavides, J., concurring).

Again, Phoenix alleges that as a direct result of McDonald's false and misleading representations

regarding the high-value prizes, McDonald's lured customers away from Phoenix and its affiliated franchisees, which, in turn, lost sales and market share. Accepting these allegations as true, we can think of no "identifiable class" of persons that is *more* proximate to the claimed injury than fast food franchisees such as Phoenix and the putative class it seeks to represent. As such, the third factor weighs in favor of prudential standing.

4. Speculative Nature of the Alleged Damages

Under the fourth factor of the *Conte Bros.* test, we examine the speculative nature of the plaintiff's alleged damages. According to Phoenix, its damages are not "speculative" because it would be "relatively straightforward" to calculate its damages as "an appropriate share of all profits associated with sales generated by the fixed promotional games" based on market share. We disagree.

As the district court noted, only "certain" high-value prizes were stolen, and customers still had a fair and equal opportunity to win one of the relatively numerous low- and mid-value prizes McDonald's offered, because those prizes were unaffected by the theft. Moreover, the fast food market consists of *many* competitors, only two of which are McDonald's and Burger King. In our view, it requires too much speculation to conclude that an ascertainable percentage of both the increase in McDonald's sales and the concomitant decrease in *Burger King's* sales during the several-year run of the games is directly attributable to McDonald's alleged misrepresentations about the chances of winning high-value prizes.

Phoenix also argues that at the pleading stage, the focus should be on what the complaint alleges, not on whether Phoenix may be able to prove the exact number of customers lured to McDonald's, because this is a matter for discovery and expert testimony. Although "general factual allegations of injury resulting from the defendant's conduct *may* suffice" to support standing "[a]t the pleading stage," *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 112 S.Ct. 2130, 2137, 119 L.Ed.2d 351 (1992) (emphasis added), to "presume" that Phoenix's allegations "embrace those specific facts that are necessary to support" its claim to an appropriate share of McDonald's profits from the compromised games requires too much conjecture. *See id.* Even accepting Phoenix's allegations as true, the speculative nature of the damages it allegedly incurred as a result of McDonald's representations regarding the high-value prizes is inescapable.

Phoenix also contends that disgorgement of the profits McDonald's made during the "fixed" promotion would be an appropriate remedy "if the district court's premature fears [regarding the incalculable nature of Phoenix's damages] were substantiated." Disgorgement of "wrongful" profits "initially developed as a remedy to provide a plaintiff relief in equity, to serve as a proxy for damages, or to deter the wrongdoer from continuing his violations" and "is most appropriate if damages are otherwise nominal." *BASF Corp. v. Old World Trading Co.*, 41 F.3d 1081, 1095-96 (7th Cir. 1994). But as the Third Circuit stated in *Joint Stock Soc'y*, "[i]f a request for relief that may be sought by any party sufficed under the fourth factor of the *Conte Bros.* test, that factor would be essentially meaningless, and we refuse to undermine the fourth factor in this way." *Joint Stock*

Soc'y, 266 F.3d at 185. "The aim of [prudential standing] is to determine whether the plaintiff is 'a proper party to invoke judicial resolution of the dispute and the exercise of the court's remedial powers.'" *Conte Bros.*, 165 F.3d at 225 (quoting *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 546 n.8, 106 S.Ct. 1326, 1334 n.8, 89 L.Ed.2d 501 (1986)). Accordingly, Phoenix may not bolster its "case for prudential standing by relying on forms of monetary relief that [it] would receive as a vicarious avenger of the general public's right to be protected against . . . false advertisements." *Joint Stock Soc'y*, 266 F.3d at 185 (internal quotation marks omitted).

We thus conclude that the fourth factor weighs against prudential standing.

5. Risk of Duplicative Damages

The fifth and final factor under the *Conte Bros.* test requires us to assess the risk of duplicative damages *or* the complexity of apportioning damages. The district court concluded that this factor weighs against standing. We agree.

If we were to hold that Phoenix has prudential standing to bring the instant claim, then every fast food competitor of McDonald's asserting that its sales had fallen by any amount during the relevant time period would *also* have prudential standing to bring such a claim. And if every fast food competitor had standing to bring such a claim, regardless of the amount in controversy, regardless of the amount of lost sales or market share directly attributable to the falsity of the advertisement, and regardless of the impact on the competitor's goodwill or reputation (as the advertisements made no mention of any

competitor), the impact on the federal courts would be substantial. Furthermore, apportioning damages among these competitors would be a highly complex endeavor.

Phoenix argues that courts applying the *Conte Bros.* test have assessed the risk of duplicative damages either by examining "the plaintiff's position in the distribution chain relative to the defendant" or by examining "whether the injury is directly related to the market" in which they compete. But courts applying the *Conte Bros.* test *also* have assessed the risk of duplicative damages by examining the number of potential claimants in the same position in the distribution chain as the plaintiff and/or in the same market as the plaintiff. For example, the Third Circuit in *Joint Stock Soc'y* assessed the fifth factor by noting that if the plaintiffs were granted prudential standing, false advertising claims could be brought against the defendant by, *inter alia*, all vodka manufacturers in the U.S. market *and* all vodka manufacturers who, like the plaintiffs, had not entered the U.S. market but had taken minimal preparatory steps for entry. 266 F.3d at 184-85. Thus, the *Joint Stock Soc'y* court considered both the number of potential claimants occupying the same position in the distribution chain as the plaintiffs (manufacturers) and the number of potential claimants in the same market as the plaintiffs (manufacturers who had not entered the U.S. market) to conclude that the fifth factor weighed against prudential standing. In *Logan*, the Fifth Circuit determined that the fifth factor weighed in favor of prudential standing because "Logan appear[ed] to be the only plaintiff who could bring a Lanham Act false advertising claim against [the defendant] based on" the challenged advertisements.

263 F.3d at 461. And in *Procter & Gamble*, the Fifth Circuit concluded that the fifth factor counseled against standing for Procter & Gamble in part because "*every competitor in the market* could sue" the defendant if Procter & Gamble were allowed standing. 242 F.3d at 564 (emphasis added).

Accordingly, we conclude that the fifth factor weighs against standing.

6. Weighing The Totality of the Factors

To summarize, the first and third *Conte Bros.* factors weigh in favor of prudential standing, while the second, fourth, and fifth factors weigh against prudential standing. Admittedly it is a close question, but we conclude that on balance, Phoenix does not have prudential standing to bring its claim against McDonald's. Although Phoenix and the class it seeks to represent are McDonald's "direct competitors," Phoenix has alleged a competitive harm to their commercial interests, and there is no identifiable class of persons that is more proximate to the claimed injury, because of the attenuated link between the alleged injury and McDonald's alleged misrepresentations, the speculative nature of the claimed damages, the potential complexity in apportioning damages, and the significant risk of duplicative damages, we hold that Phoenix does not have prudential standing to bring a false advertising claim under the Lanham Act against McDonald's.

In so holding, we say nothing about the outcome of this analysis if, for example, the facts were such that McDonald's had falsely advertised the odds of winning all of its prizes (low-, mid-, and high-value), *or* if McDonald's were only giving away a

single prize and falsely represented the odds of winning, as these hypotheticals present factual scenarios materially different from the facts of this case. Indeed, as stated above, a salient virtue of the *Conte Bros.* test is that it provides a flexible yet principled means of determining the existence of prudential standing for disparate factual scenarios, thereby allowing courts to foreclose standing on one set of facts while recognizing standing when presented with a slightly (but materially) different set of facts.

III. CONCLUSION

For the foregoing reasons, we **AFFIRM**.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

PHOENIX OF BROWARD, INC. on behalf of itself and similarly situated Burger King Franchisees, Plaintiff, v. MCDONALD'S CORPORATION, Defendant.	CIVIL ACTION NO. 1:06-CV-394-CAP

ORDER

This matter is before the court on the defendant's motion to dismiss [Doc. No. 13].

Factual Background

The plaintiff, Phoenix of Broward, Inc. ("Phoenix"), is a licensed Burger King franchisee operating a Burger King fast food restaurant in Ft. Lauderdale, Florida. Although not a party to this lawsuit, Burger King Corporation owns, operates, and franchises Burger King fast food restaurants throughout the world. There are approximately 11,000 Burger King restaurants worldwide.

Like Burger King, the defendant, McDonald's

Corporation ("McDonald's"), owns, operates, and franchises fast food restaurants throughout the world. There are approximately 30,000 McDonald's restaurants in 119 countries, of which approximately 13,000 are located in the United States.

McDonald's and Burger King are competitors in the fast food restaurant industry. Both companies use a variety of promotional strategies to attract customers, generate sales, and engender customer loyalty. For example, beginning in 1995 and continuing until 2001, McDonald's ran games, such as the "Monopoly Game at McDonald's," "Hatch, Match and Win," and "Who Wants to be a Millionaire Game." Each of these promotional games had low-value, mid-value, and high-value prizes. Low-value prizes included food items and low dollar cash prices. High-value prizes included vehicles and cash of up to $1 million. Generally, there were two opportunities to win the $1 million grand prize: (1) by obtaining the $1 million instant winner game piece, or (2) by collecting certain game pieces.

McDonald's extensively advertised and promoted each of the games it offered to the public. As part of its advertisements, McDonald's allegedly represented that all customers had a fair and equal opportunity to win all of the offered prizes, including the high-value prizes. McDonald's advertisements also listed the odds of winning specific prizes.

According to Phoenix's complaint, because customers desired the opportunity to win the promoted prizes, especially the high-value prizes, McDonald's promotional games produced a substantial amount of revenue over and above the normal revenue stream.

In approximately April 2000, the Federal Bureau of Investigation ("FBI") began investigating McDonald's promotional games. According to Phoenix, at some time before or while the games were underway, the FBI informed McDonald's that there were problems with the random distribution of McDonald's game pieces. Despite this alleged knowledge, McDonald's continued to advertise and promote its games as if all customers had an equal opportunity to win the high-value prizes.

In 2001, the United States Department of Justice and the FBI announced that since at least 1995, certain of McDonald's promotional games had been compromised by a criminal ring led by an individual employed by Simon Marketing, Inc. ("Simon"), th company McDonald's engaged to operate its promotional games. Specifically, between at least 1995 and August 2001, Simon's Director of Security, Jerome Jacobson, diverted at least $20 million in high-value prizes from McDonald's games by embezzling game pieces and distributing them to a network of "winners." When describing Jacobson's crime, the Attorney General of the United States stated, "[t]his fraud scheme denied McDonald's customers a fair and equal chance of winning."

On or about April 5, 2002, Jacobson pled guilty to charges of conspiracy and mail fraud. Approximately 45 other individuals also entered guilty pleas in connection with the conspiracy.

Upon disclosure by McDonald's to the public that certain of its promotions had been fixed, McDonald's created an independent task force to review all of its promotional procedures. McDonald's

then introduced additional security procedures to ensure the integrity of future promotional games.

The disclosure of the fraud scheme also opened the floodgates to a wide variety of civil litigation against McDonald's. Consumers filed several class-action lawsuits against McDonald's alleging consumer fraud, negligence, and unjust enrichment. On April 19, 2002, McDonald's settled these lawsuits by, among other things, agreeing to implement a $15 million instant giveaway, which provided the public with the opportunity to win 15 $1 million prizes.

The consumer lawsuits, however, did not end McDonald's woes. On February 22, 2006, Phoenix filed this action against McDonald's on behalf of itself and all similarly situated Burger King franchisees. The proposed class includes over 1,100 Burger King franchisees. The only claim for relief alleged by Phoenix is a false advertising claim brought pursuant to § 43(a) of the Lanham Act.

Section 43(a) of the Lanham Act creates a "civil remedy for entities injured by their competitor's false or misleading advertising." *Tire Kingdom, Inc. v. Morgan Tire & Auto, Inc.*, 915 F. Supp. 360, 364 (M.D. Fla. 1996). The pertinent portion of the statute attributes liability to any person or entity who uses in commerce any false or misleading description of fact or false and misleading representation of fact which, in "commercial advertising or promotion, misrepresents the nature, characteristics, qualities or geographic origin of his or her or another person's goods, services or commercial activities . . . ." 15 U.S.C. § 1125(a)(1)(B). To succeed on its false advertising claim, Phoenix has the burden of showing that: (1) McDonald's advertisements are false or

misleading; (2) the advertisements deceived, or had the capacity to deceive, consumers; (3) the deception had a material effect on purchasing decisions; (4) the misrepresented advertisements affect interstate commerce; and (5) Phoenix has been or is likely to be injured as a result of the false advertising. *Johnson & Johnson Vision Care, Inc. v. 1-800 Contacts, Inc.*, 299 F.3d 1242, 1247 (11th Cir. 2002).

In this case, Phoenix alleges that McDonald's advertisements stating that each player had a fair and equal chance to win the high-value prizes in the rigged games were false. In reality, many of the high-value prizes had been stolen by Jacobson's criminal ring. Phoenix claims that such advertising unlawfully diverted sales away from Burger King restaurants to McDonald's restaurants. Phoenix also alleges that McDonald's conduct was "intentional and/or sufficiently reckless" enough to subject McDonald's to treble damages.[1] For instance, Phoenix claims that McDonald's "knowingly and deliberately" continued to advertise that its games were fair after learning that the games were compromised.

As recompense for the "diversion of their customers," Phoenix asks the court to: (1) order McDonald's to disgorge an appropriate share of McDonald's profits associated with sales generated by the fixed promotional games, and (2) award the class their actual damages, treble damages, pre-judgment and post-judgment interest, and costs and expenses.

---

[1] Although Phoenix claims that McDonald's conduct was intentional or reckless, nowhere in the complaint does Phoenix allege that McDonald's was involved in Jacobson's criminal plan, nor does Phoenix allege that McDonald's knew Jacobson was going to steal game pieces before he did.

Notably, Phoenix does not seek an injunction, presumably because the criminal activity causing the falsity of McDonald's advertisements ceased after the FBI and the Department of Justice concluded their investigation and Jacobson pled guilty.

On April 17, 2006, McDonald's filed the present motion to dismiss. McDonald's advances three arguments in support of its motion to dismiss. First, McDonald's argues that Phoenix lacks prudential standing to bring this lawsuit. Second, McDonald's asks the court to rule that the criminal conduct of Jacobson and his conspirators is an intervening cause that severs any possible liability on the part of McDonald's. Third, McDonald's claims that Phoenix's complaint should be dismissed because Phoenix failed to plead its Lanham Act claim with the specificity required by Federal Rule of Civil Procedure 9(b).

Legal Analysis

A. *Standard of Review and Novelty of Phoenix's Claim*

When considering a motion to dismiss, the court must accept the facts pleaded as true and construe them in a light favorable to the non-movant. *See Covad Communications Corp. v. BellSouth Corp.*, 299 F.3d 1272, 1279 (11th Cir. 2002).

Before reaching McDonald's standing arguments, the court must address the parties' initial disagreement. The parties spend much of their briefs arguing about whether Phoenix's theory of liability is novel. For instance, McDonald's argues that "never before has a company brought a Lanham Act claim

against a competitor whose advertising allegedly became 'false' or 'misleading' solely because of the felonious conduct of third parties." In response, Phoenix cites to *BASF Corp. v. Old World Trading Co.*, 41 F.3d 1081 (7th Cir. 1994) and *Lubrizol Corp. v. Exxon Corp.*, Civil Action No. 91-CV-1472 (N.D. Ohio) as examples of just such a complaint.

After reviewing the cases cited by the parties, the court concludes that both parties are partially correct. Phoenix is correct in the sense that companies have brought Lanham Act claims against competitors who argued that they acted in good faith when they generated the advertisement at issue. *See, e.g., Parkway Baking Co. v. Freihofer Baking Co.*, 255 F.2d 641, 648 (3d Cir. 1958) (concluding that the fact that the name of a licensee's subsidiary appeared on a bread wrapper due to a mistake caused either by a third-party printer or the defendant was not a defense to a § 43(a) false designation of origin claim because there is no requirement that the falsification occur wil[l]fully or with the intent to deceive); *American Rockwool, Inc. v. Owens-Corning Fiberglass Corp.*, 640 F. Supp. 1411, 1449 (E.D.N.C. 1986) ("Plaintiff's contention that because it relied on a certified laboratory's test results in making its label representations, these representations cannot be false under the Lanham Act, is simply without merit . . . . This evidence could support a finding that the plaintiff reasonably should have known that its bag labels were false; again, there is no requirement under the Lanham Act of proof of specific knowledge of the falsity of the representation made."). For example, in *BASF*, 41 F.3d at 1081, Old World Trading Company advertised that its antifreeze met certain industry specifications. Old World did not, however, conduct its own testing. Instead, it

contracted out its antifreeze blending and testing to a third party, Dearborn Chemical Company. BASF brought suit against Old World, claiming that Old World never actually tested its antifreeze to determine whether it met the specifications. Old World responded by stating that Dearborn's representatives assured Old World that the antifreeze formula met the specifications. Despite Old World's claims of good faith, the Seventh Circuit affirmed the district court's holding that Old World was liable to BASF for false advertising.

The *BASF* case is consistent with the well-settled concept that no proof of intent or willfulness is required to establish a false advertising claim pursuant to § 43(a) of the Lanham Act. *See Vector Products, Inc. v. Hartford Fire Insurance Co.*, 397 F.3d 1316, 1319 (11th Cir. 2005); *see also* 1A Louis Altman, CALLMAN ON UNFAIR COMPETITION, TRADEMARKS AND MONOPOLIES § 5:28 (4th ed. 2006) ("As a general rule, [ ] courts do not inquire into the good or bad faith of the advertiser, or the purpose of the advertisement, in passing upon its truth or falsity. The deceptive or misleading quality of the advertisement is not vitiated by the advertiser's good faith and, accordingly, intent to deceive is not an element of the violation. An innocent state of mind does not diminish the false advertiser's unfair advantage over competitors."); Lillian R. BeVier, *Competitor Suits for False Advertising Under Section 43(a) of the Lanham Act: A Puzzle in the Law of Deception,* 78 Va. L. Rev. 40-41 (1992) ("Under current interpretations of section 43(a), advertisers are strictly liable both for an express or implied claim's falsity and for the fact that it was made. Thus, the advertiser's intent or her negligence is in principle irrelevant in two quite different ways . . . .

[A]s to the truth or falsity of the representation, it does not matter whether the advertiser believed it to be true, or even whether she had reasonable grounds for such a belief . . . ."). Rather, as the Eleventh Circuit has held, § 43(a) creates a strict liability tort cause of action. *Vector*, 397 F.3d at 1319. Thus, the fact that McDonald's acted in good faith when it created the advertisements at issue is not a defense to Phoenix's action.

On the other hand, McDonald's is correct in that the court has been unable to locate any case where a company brought a Lanham Act claim against a competitor whose advertising became false or misleading due to the *felonious conduct* of *third* parties. Although arguably factually similar, *BASF* does not deal with allegedly felonious conduct. The *Lubrizol* case, moreover, does not have any published decisions, and the case was settled before final judgment.

B. *Standing*

Turning to the standing issue, McDonald's first substantive argument is that Phoenix lacks prudential standing to bring its false advertising claim. The requirement of standing is both a constitutional limitation on federal court jurisdiction and a prudential limitation on its exercise. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, 2136 (1992). The constitutional requirements for standing emanate from Article III of the United States Constitution, which states that federal courts may only adjudicate cases or controversies. *Allen v. Wright*, 468 U.S. 737, 750-51, 104 S. Ct. 3315, 3324 (1984). Constitutional standing requires only that a plaintiff have suffered an injury in fact, that there be

a causal connection between the injury and the defendant's conduct, and that the injury be redressable by a favorable court decision. *Lujan*, 504 U.S. at 560, 112 S. Ct. at 2136.

In addition to the constitutional requirements, federal courts adhere to a second standing component that is based on prudential concerns. The goal of prudential standing, like constitutional standing, is to determine whether the plaintiff "is a proper party to invoke judicial resolution of the dispute and the exercise of the court's remedial powers." *Bender v. Williamsport Area School District*, 475 U.S. 534, 546 n.8, 106 S. Ct. 1326, 1334 (1986).

The Eleventh Circuit has not addressed what test the court should use in determining whether a plaintiff has prudential standing to bring a Lanham Act false advertising claim. Outside the Eleventh Circuit, courts have developed two tests to determine whether a plaintiff has prudential standing to assert a false advertising claim under the Lanham Act. The Seventh, Ninth, and Tenth Circuits appear to have adopted a categorical approach, holding that to have standing to assert a Lanham Act false advertising claim, the plaintiff must be a competitor of the defendant and allege a competitive injury. *See Stanfield v. Osborne Industries, Inc.*, 52 F.3d 867, 873 (10th Cir. 1995); *L.S. Heath & Son, Inc. v. AT&T Information Systems, Inc.*, 9 F.3d 561, 575 (7th Cir. 1993); *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1110 (9th Cir. 1992). On the other hand, the Third and Fifth Circuits have adopted a less categorical multi-factor test, based on the Supreme Court's test for antitrust standing, that focuses judicial enforcement of the Lanham Act on the protection of commercial interests and the prevention of competitive harm.

See Conte Bros. Automotive, Inc. v. Quaker State-Slick 50, Inc., 165 F.3d 221, 233-35 (3d Cir. 1998); *Procter & Gamble Co. v. Amway Corp.*, 242 F.3d 539, 562-64 (5th Cir. 2001). Under the *Conte Bros.* test, five factors are relevant to the prudential standing analysis: "(1) the nature of the plaintiff's alleged injury, (2) the directness or indirectness of the asserted injury, (3) the proximity or remoteness of the party to the alleged injurious conduct, (4) the speculativeness of the damages claim, and (5) the risk of duplicative damages or complexity in apportioning damages." *Id.* at 563.

After a survey of the caselaw in other circuits, the court finds the test set forth in *Conte Bros.*, 165 F.3d at 233-35, persuasive. *Cf. Alphamed Pharmaceuticals Corp. v. Arriva Pharmaceuticals, Inc.*, 391 F. Supp.2d 1148, 1161 (S.D. Fla. 2005) (using the *Conte Bros.* test to determine whether a biopharmaceutical company had standing to sue an alleged competitor for false advertising in violation of the Lanham Act). The *Conte Bros.* test provides the court with appropriate flexibility to address factually disparate scenarios, while at the same time supplying a principled means for addressing standing under the false advertising prong of § 43(a). Thus, the court will next address each factor of the *Conte Bros.* test separately.

1. *Whether Phoenix's Injury is the Type of Injury Congress Sought to Redress in the Lanham Act*

The first *Conte Bros.* factor directs the court to decide whether the "alleged injury is of a type Congress sought to redress in providing a private remedy for violations of the Lanham Act." *Procter &*

Gamble, 242 F.3d at 563. The Lanham Act has two aims: (1) vindicating commercial interests that have been harmed by a competitor's false advertising, and (2) securing to the business community the advantages of reputation and good will by preventing their diversion from those who have created them to those who have not. *Conte Bros.*, 165 F.3d at 234.

While the court doubts that Congress sought to redress advertising rendered false by the criminal conduct of third parties,[2] the court concludes that this factor weighs in favor of a finding of standing. McDonald's and Phoenix are unquestionably competitors in the fast food industry. Also, as noted above, the Eleventh Circuit has described false advertising claims as "strict liability tort[s]." *Vector*, 397 F.3d at 1319. Accordingly, McDonald's good faith does not immunize it from liability, nor does it transform Phoenix's claim from the type of claim the Lanham Act was designed to prevent.

Although this factor weighs in favor of standing, the court concludes that it does so only weakly. The advertisements at issue did not tout McDonald's products or services, nor did they disparage the products or services of Burger King. Instead, the advertisements focused on the odds of winning certain high-value prizes in various promotional games. There is no indication that Burger King's good will or reputation was harmed

---

[2] Phoenix does not allege that any employee of McDonald's was involved in Jacobson's criminal ring. At most, Phoenix claims that McDonald's continued to advertise that the rigged games were fair after it received notice from the FBI that it was investigating the possibility that the games were rigged. Phoenix also suggests that McDonald's security before learning of Jacobson's criminal activity was lax.

directly or indirectly by the allegedly false advertisements. As seems apparent from the spate of consumer lawsuits against McDonald's, if there has been any harm caused by Jacobson's criminal conduct, it has been McDonald's reputation that has ultimately suffered, not Burger King's.

In support of its argument that this factor is practically dispositive of the standing issue, Phoenix makes much of the fact that the advertisements at issue were literally false. For instance, Phoenix claims that a competitor who engages in literally false advertising moves directly to a damages defense. The court, however, fails to see how this changes the court's conclusion that this factor weighs only weakly in favor of standing. First, it is not true that a competitor whose advertisements are literally false only has a damages defense. The Eleventh Circuit has held that a plaintiff must still prove that the advertising was material to customers. *Johnson & Johnson*, 299 F.3d at 1250. Second, the alleged literal falsity of McDonald's advertisements does not change the fact that the injury to Phoenix's commercial interests caused by the advertisements can hardly be described as typical. Again, as noted above, McDonald's advertisements did not tout McDonald's products or services or disparage Burger King's products or services. Any effect, therefore, on Burger King's good will or reputation is absent or, at the very least, attenuated.

2. *The Directness of Phoenix's Injury*

The second *Conte Bros.* factor looks at whether the defendant's conduct has had a direct effect on either the plaintiff or the market in which the parties participate. *Joint Stock Society v. UDV North*

America, 266 F.3d 164, 181 (3d Cir. 2001). Phoenix describes its alleged direct injury as stemming from the fact that McDonald's misrepresented the odds of winning a few, but not all, of its prizes in certain promotional games and that this misrepresentation led to an "unnatural spike" in McDonald's profits. Phoenix then argues that customers would have eaten at Burger King, instead of McDonald's, had they known that a few of the high-value prizes in particular games were unavailable, even though all of the other prizes could be won. Even taking Phoenix's allegation that there is a causal connection between the two facts as true, it still requires Phoenix to prove a complex causal chain. Given the length and complexity of the causal links leading to Phoenix's "direct" injury, the court concludes that this factor weighs only moderately in favor of prudential standing.

3. *Proximity of Phoenix to the Allegedly Injurious Conduct*

The third factor requires the court to determine whether there is an identifiable class of persons whose "self-interest would normally motivate them to vindicate the public interest," thus diminishing the "justification for allowing a more remote party . . . to perform the offices of a private attorney general." *Joint Stock Society*, 266 F.3d at 182. The court construes the third factor as looking at whether there is an identifiable group that is better suited to vindicate the public interest, not at whether there is a better group to sue for false advertising under the Lanham Act. The court concludes that there is.

In this case, the harm caused by McDonald's

allegedly false advertisements more directly affects the customers who were denied the opportunity to compete for the few high-value prizes criminally co-opted by Jacobson. While these customers do not have standing to sue under the Lanham Act, they could and did vindicate the public interest by suing McDonald's for fraud. Thus, there is no need to empower Phoenix to act as a private attorney general in this case.

4. *Speculativeness of the Damages*

The fourth factor, the speculativeness of the damages, weighs heavily against standing. It is undisputed that only a few of the high-value prizes in each game were affected by Jacobson's criminal behavior. It is also undisputed that the low-value and mid-value prizes were unaffected by Jacobson's conduct and that McDonald's gave away millions of prizes in its contests. Phoenix, nevertheless, argues that some identifiable segment of the public that was planning on going to Burger King opted instead to go to McDonald's solely because it was seeking to win a high-level prize in one of McDonald's games.

Given the number of fast food competitors of McDonald's, as well as the difficulty in determining what percentage of customers would have gone to Burger King, and not some other restaurant, but for McDonald's allegedly false advertisements, it is hard to see how any damages awarded would not be highly speculative. Further, the fact that the promotional games took place over a period of several years in many geographic markets throughout the world also increases the speculativeness of the damages. Finally, the notion that Phoenix will be able to prove that some ascertainable number of customers visited

McDonald's for the specific purpose of winning one of the few high-value prizes that were affected by Jacobson's criminal behavior and cared nothing for the low-value and mid-value prizes is difficult to imagine.

5. *Risk of Duplicative Damages*

The fifth and final *Conte Bros.* factor asks the court to assess the risk of duplicative damages and the complexity of apportioning damages. Like the previous factor, this factor weighs heavily against standing. If the court were to find that Phoenix has standing to sue McDonald's over advertising that was rendered false by the criminal conduct of a third party concerning a promotional game, as opposed to McDonald's or Burger King's goods or services, it could engender copycat suits by each and every one of McDonald's competitors. Because damages are so speculative, the risk of broad and overlapping damages caused by these lawsuits is great. There is also a great risk that Phoenix's lawsuit will create an administratively complex damages proceeding.

Allowing prudential standing, moreover, would result in a great increase in litigation. If every fast food competitor had a cause of action for false advertising regardless of the speculativeness of the damages, regardless of any impact on the competitor's good will or reputation, and regardless of the remote nature of the injury suffered, the impact on federal courts would be significant.

6. *Weighing the Totality of the Conte Bros. Factors*

In sum, the first two factors weigh moderately

or weakly in favor of standing, while the remaining three factors weigh against prudential standing. Although it is true that Phoenix is a direct competitor of McDonald's, under the *Conte Bros.* test, standing does not turn on the label placed on the relationship between the parties. *Conte Bros.*, 165 F.3d at 235. Given the existence of more directly injured parties, the tenuousness and sheer speculativeness of Phoenix's damages claim, and the possibility of multiple duplicative recoveries, the court concludes that Phoenix does not have prudential standing to bring a § 43(a) false advertising claim against McDonald's.

C. *Whether Jacobson's Theft is an Intervening Cause that Severs McDonald's Liab[i]lity and Whether Phoenix Failed to Comply with Rule 9(b)'s Heightened Pleading Requirements*

Because the court concludes that Phoenix lacks prudential standing to assert a false advertising claim against McDonald's, there is no need for the court to address McDonald's remaining arguments in support of dismissal.

Conclusion

For the foregoing reasons, McDonald's motion to dismiss [Doc. No. 13] is GRANTED to the extent that the court concludes that Phoenix lacks prudential standing to bring its false advertising claim against McDonald's. Because Phoenix's false advertising claim is the only claim asserted by Phoenix, this action is DISMISSED WITH PREJUDICE and the clerk is DIRECTED to close the file.

SO ORDERED, this 1st day of August, 2006.

/ s / Charles A. Pannell, Jr.
CHARLES A. PANNELL, JR.
United States District Judge

APPENDIX C

ORIGINAL
FILED IN CLERK'S OFFICE
U.S.D.C. Atlanta, FEB 22 2006
LUTHER D. THOMAS, Clerk
BY: /s/ Deputy Clerk

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

PHOENIX OF BROWARD, INC. on Behalf of Itself and Similarly Situated Burger King® Franchisees, 1101 S. Rogers Circle, Suite 10 Boca Raton, Florida 33487, Plaintiff, v. McDONALD'S CORPORATION, One McDonald Plaza Oak Brook, Illinois 60523, Defendant.	)	1:06-CV- 0394-CAP CLASS ACTION COMPLAINT JURY DEMAND ENDORSED HEREON

Phoenix of Broward, Inc. on behalf of itself and similarly situated Burger King® Franchisees (collectively "Class BK Franchisees"), hereby refile their Complaint against Defendant McDonald's Corporation ("McDonald's"). These Plaintiffs first filed this Complaint in this Court on August 18, 2005, at which time it was assigned to the Honorable Charles A. Pannell, Jr. with the Case

No. 1:05-CV-02153. Thereafter, Plaintiffs voluntarily dismissed the case without prejudice pursuant to Fed.R.Civ.P. 41(a) on August 26, 2005. This Complaint is hereby refiled within the six months provided by law. For their Complaint against McDonald's, the Class BK Franchisees restate and reallege as follows:

I. *INTRODUCTION*

1. From July 11 through August 9, 2001, McDonald's marketed the 10th anniversary of its celebrated Monopoly promotions by offering consumers the chance to win another million dollars in "an exciting new . . . game." Just twelve days later, however, McDonald's confessed to the public not only that its anniversary game had been rigged, but so had many of the other games which had been its "customers' favorites." Indeed, a 16-month FBI investigation had ferreted out a sophisticated criminal ring engaged for years in what then-U.S. Attorney General John Ashcroft decried as a "fraud scheme" which "denied McDonald's customers a fair and equal chance of winning."

2. Although McDonald's declined to offer an apology, its spokesman declared that one of McDonald's "top priorities" was its "responsibility" to "return the money." A spate of litigation ensued thereafter, during which it was disclosed that McDonald's games had been rigged since at least 1995 and upwards of $25 million of high-level prizes had been wrongfully diverted from its contests, including virtually all of the million dollar prizes. Ultimately, years later, McDonald's settled multiple class action lawsuits on behalf of

consumers by running another game, this time offering 15 one million dollar prizes. McDonald's also paid an eyebrow-raising $16 million settlement to the very company it had hired to be responsible for the security of its games, but which fulfilled that responsibility by employing the ringleader of the entire scam.

3. These settlements, however, pale in comparison to the huge profits McDonald's reaped for years from luring customers away from its competitors with offers of hollow chances to win fortunes. Although McDonald's executives have acknowledged that such games produce an "unnatural spike in profits," McDonald's has never seen fit to compensate any of its competitors for the losses they suffered as a result of McDonald's unfair competition. The Lanham Act, however, provides federal statutory relief precisely for such losses, which the instant Plaintiffs now respectfully seek in this Court.

II. *PARTIES, VENUE AND SUBJECT MATTER JURISDICTION*

4. Phoenix of Broward, Inc. ("Phoenix") is, and at all relevant times herein was, a corporation organized and existing under the laws of the State of Florida with its principal place of business at 1101 S. Rogers Circle, Suite 10, Boca Raton, Florida 33487. Phoenix is a licensed Burger King Franchisee which operates a Burger King fast food restaurant at 666 W. Broward Blvd., Fort Lauderdale, Florida. Phoenix is also affiliated with a number of other licensed Burger King Franchisees which operate Burger King restaurants at other locations in the United

States ("Affiliate Franchisees"). As licensed Burger King Franchisees, Phoenix and its Affiliate Franchisees operate these restaurants so that they include the recognized design, decor, color scheme and style of buildings, as well as uniform standards, specifications and procedures relating to its operation, quality and uniformity of products and services, procedures for inventory and management.

5. Although not a party, Burger King Corporation ("Burger King") is, and at all relevant times herein was, a corporation organized and existing under the laws of the State of Florida with its principal place of business at 5505 Blue Lagoon Drive, Miami, Florida 33126. Burger King franchises licensed Burger King Franchisees, such as Phoenix and its Affiliate Franchisees, to operate independently owned fast food restaurants in the United States and abroad, and also directly owns and operates fast food restaurants in all of the United States and abroad. Since its founding in 1954, Burger King has become one of the leaders in the fast food industry with over 11,000 restaurant locations worldwide, which collectively serve over 11 million customers every day.

6. McDonald's is, and at all times relevant herein was, a corporation organized and existing under the laws of the State of Delaware with its principal place of business at One McDonald Plaza, Oak Brook, Illinois 60523. Like Burger King, McDonald's also owns, operates, and franchises fast food restaurants in all of the United States and abroad. There are approximately 30,000 McDonald's restaurants in 119 countries worldwide, of which approximately

13,000 are located in the United States. McDonald's restaurants reportedly serve approximately 50 million customers every day.

7. This Court has subject matter jurisdiction over this action pursuant to 15 U.S.C. § 1121 and 28 U.S.C. §§ 1331 and 1338.

8. Venue is proper in this District pursuant to 28 U.S.C. § 1391(b) because, *inter alia,* McDonald's resides in this District, and a substantial part of the events giving rise to the claims occurred in this District and Georgia.

9. McDonald's does business in the State of Georgia and this District, and accordingly has registered its authorized agent for service of process with the Georgia Secretary of State as Prentiss Hall Systems, Inc., 40 Technology Parkway South, No. 300, Norcross, Georgia 30092.

III. *ALLEGATIONS COMMON TO ALL CLAIMS*

A. *Introduction*

10. This case concerns McDonald's false, deceptive and/or misleading representations concerning promotional games that McDonald's used to attract customers to its restaurants and enhance customer loyalty from 1995 (if not earlier) through at least August 2001.

11. With respect to these promotional games, McDonald's explicitly and implicitly represented to the public that players stood a fair and equal opportunity to win certain grand prizes (and even went so far as to represent specific odds of

obtaining winning game pieces), when, in fact, the promotional games had been fixed by a criminal ring who embezzled the high-value game pieces and prevented the general public from winning such prizes.

12. As the direct and proximate result of these false, deceptive and/or misleading misrepresentations, McDonald's diverted business away from Burger King Franchisees, and also obtained windfall profits that it would not otherwise have obtained.

B. *Background*

13. McDonald's and Burger King have long been considered the two leading competitors in the fast food industry. Significantly, the daily competition to draw customers into their respective restaurants extends beyond price, food quality, menu selections and better service to include such other customer attractions as promotional contests and games, playgrounds, toy giveaways (as part of meals for children), restaurant design and tie-ins with popular motion pictures and television programs.

14. McDonald's devotes substantial sums to advertising and promoting its company-owned and franchised restaurants and products. Such advertising appears in virtually every form of media, including television, radio and print. McDonald's reportedly spends hundreds of millions of dollars each year on advertising. Upon information and belief, McDonald's further requires its franchisees not only to contribute substantial sums to McDonald's advertising and

promotic[illegible] expenditures, but, *inter alia,* to adhere [illegible] and participate in advertising and promotions developed and directed by McDonald's for all or substantial segments of the McDonald's system, including the rigged games promotions described herein.

C. ***McDonald's Promotional Games***

15. McDonald's has for many years offered patrons the opportunity to win prizes, ranging from food and drink prizes to cash prizes of up to $1 million, in games designed to attract customers away from competing fast food restaurants, including those owned by Burger King Franchisees, and divert them to McDonald's restaurants, thereby generating for McDonald's greater sales, customer loyalty and market share.

16. McDonald's games have included, *inter alia,* "Monopoly Game at McDonald's," "Hatch, Match and Win," "When the USA Wins You Win," "The Deluxe Monopoly Game," "The Monopoly and More Game at McDonald's," "Disney's Masterpiece Collection Trivia Challenge at McDonald's," "Who Wants to be a Millionaire Game," and "Pick Your Prize Monopoly."

17. Each of the promotional games has had low-value, mid-value and high-value prizes. Customers have had the opportunity to become instant winners or winners by collecting specific game pieces. Low-value prizes have included food items and low dollar cash prizes. High-value prizes have included vehicles and cash of up to one million dollars. Generally, there have been two opportunities to win the one million dollar grand

prize, one by obtaining the one million dollar instant winner game piece and one by collecting certain game pieces.

18. Promotional games have been an important and material part of McDonald's advertising strategy. Because customers desire the opportunity to win the promoted prizes, especially the high-value prizes, McDonald's promotional games have produced a substantial amount of revenue over and above the normal revenue stream. Such games, in fact, have been purposefully designed to induce, and have induced, additional customer patronage so that customers will have more opportunities to win instantly and/or to accumulate combinations of winning game pieces. The consumers' perception that they have the opportunity to win such prizes, especially the high-value prizes, by patronizing McDonald's restaurants has thus been material to the increased product sales and corresponding increased revenue and profits McDonald's has enjoyed while the promotions ran. According to a 2001 news report, Alan Feldman, then-President and Chief Operating Officer of McDonald's, the Americas, credited promotions such as McDonald's games as generating "an unnatural spike in sales."

a. ***The Scheme to Fix McDonald's Promotional Games***

19. McDonald's has extensively advertised and promoted each of the games it has offered to the public. Specifically, McDonald's explicitly and/or implicitly represented in commercial advertising and promotion that all customers had a fair and equal opportunity to win all prizes, including the

more valuable high-value prizes. As further explained below, such representations were literally false, deceptive and/or misleading.

20. Moreover, McDonald's has expressly represented in commercial advertising and promotion the specific odds of winning specific prizes, including high-value prizes. As further explained below, such representations were literally false, deceptive and/or misleading.

21. For nearly 20 years prior to August 2001, McDonald's contracted with Simon Marketing, Inc. ("Simon") to operate its customer loyalty programs, including promotional games such as the ones described above, on McDonald's behalf. At all relevant times, Simon acted as McDonald's agent in conducting such customer loyalty programs. Simon has claimed in litigation against McDonald's that it was a virtual captive of McDonald's, and reported in an SEC filing that 78 percent of Simon's net sales were to McDonald's.

22. Beginning in or about 1995 if not earlier, Simon's Director of Security, Jerome P. Jacobson, a/k/a "Uncle Jerry" ("Jacobson"), who had been entrusted with the responsibility of ensuring the integrity of McDonald's promotional games, began a conspiracy to fix such games by directing rare winning high-value game pieces to fellow conspirators.

23. Between at least 1995 and August 2001, Jacobson embezzled at least $20 million worth of high-value prize pieces in such games as "The Deluxe Monopoly Game at McDonald's," "Disney's Masterpiece Collection Trivia Challenge at

McDonald's," "Monopoly Game at McDonald's," "Hatch, Match and Win," "Who wants to be a Millionaire Game," and "Pick Your Prize Monopoly at McDonald's."

24. Jacobson and/or his co-conspirators sold the embezzled winning pieces to a host of others who then claimed (or recruited others to claim) the grand prizes from McDonald's.

25. On or about April, 2000, the Federal Bureau of Investigation ("FBI") began an investigation of McDonald's promotional games. At some time before and/or while compromised games were underway, the FBI informed McDonald's that there were problems with the random distribution of McDonald's game pieces. Despite knowing that the integrity of its promotional games had been compromised, McDonald's continued to advertise and promote its games as though customers stood a fair and equal chance of winning the high-value prizes. Such representations were all literally false, deceptive and/or misleading.

26. On August 21, 2001, the United States Department of Justice ("DOJ") and the FBI announced the discovery of the Jacobson's scheme and the arrest of eight individuals, including Jacobson, associated with the scheme. In announcing the arrests, then Attorney General of the United States, John Ashcroft, commented that "[t]his fraud scheme denied McDonald's customers a fair and equal chance of winning." A corporate press release issued by McDonald's about the arrests likewise quoted its Chairman and Chief Executive Officer, Jack M. Greenberg, as describing the scheme as "a highly sophisticated

inside game of fraud and deception."

27. On or about April 5, 2002, Jerome Jacobson pleaded guilty to charges of conspiracy and mail fraud. Approximately 50 others have also entered guilty pleas.

28. Upon disclosure by McDonald's to the public that its games promotions had been fixed for years, McDonald's created an independent task force to review all its promotions procedures. In response, industry observers noted that McDonald's introduction of long-available, sophisticated security procedures to ensure the integrity of its games promotions raised disturbing questions about its lack of vigilance in the past.

IV. *CLASS ACTION ALLEGATIONS*

29. Phoenix, pursuant to Rule 23 of the Federal Rules of Civil Procedure, brings this action as a class action on behalf of itself and all other similarly situated Burger King® Franchisees which operated restaurants in markets in and outside the United States where and when McDonald's ran the rigged games promotions identified herein (hereinafter "Class BK Franchisees").

30. Phoenix and its Affiliate Franchisees have directly competed at all relevant times with nearby McDonald's fast food restaurants, which ran McDonald's rigged promotional games described herein. As the direct and proximate result of McDonald's false, misleading and/or deceptive advertising and unfair competition, customers were diverted from Phoenix and its Affiliate

Franchisees, who accordingly not only lost profits due, *inter alia,* to reduced sales, but also incurred costs in connection with common counteractive efforts to retain those customers. Phoenix's claims, as well as those of its Affiliate Franchisees, are typical of the claims of the Class BK Franchisees.

31. The members of the Class are so numerous that the joinder of all members is impracticable. The Class includes over 1100 Burger King Franchisees.

32. There are questions of law and fact common to the Class, including all of the elements of a Lanham Act false advertising violation as follows:

(a) Whether McDonald's made false, misleading and/or deceptive statements of fact about its products in commercial advertising and promotion;

(b) Whether such statements either deceived, or had the capacity to deceive a substantial segment of potential customers;

(c) Whether the deception was material and likely to influence customers' purchasing decisions;

(d) Whether McDonald's products were in interstate commerce; and

(e) Whether Class BK Franchisees have been damaged as a result of the statements at issue.

33. Phoenix will fairly and adequately represent

and protect the interests of the members of the Class. Its interests are not antagonistic to, but rather are coincident with, the interests of other Class members. Phoenix will vigorously prosecute this action, and has retained counsel who is competent and experienced in class actions and other complex litigation, including Lanham Act false advertising litigation, and is fully qualified to prosecute the claims of the Class.

34. The issues of law and fact that are common to the Class as a whole predominate over any questions affecting only individual members, and a class action is superior to other available methods for the fair and efficient adjudication of this controversy.

35. Nearly all, if not all of the primary questions pertinent to the liability of McDonald's are questions common to the Class as a whole because the issues relate to the same defendant, the same advertising, and the same competitive injury. The only individual issues relate to the amount of the damages suffered.

V. *THE CLAIMS FOR RELIEF AGAINST MCDONALD'S*

(Violations of Section 43(a) of the Lanham Act)

36. Phoenix for itself and on behalf of the Class BK Franchisees repeat and make a part hereof each and every allegation set forth in paragraphs 1 through 35 of the Complaint.

37. The Class BK Franchisees competed directly at all relevant times with McDonald's restaurants which ran McDonald's rigged games promotions described herein.

38. McDonald's used false, deceptive and/or misleading descriptions of fact and/or misrepresentations of fact regarding their promotional games in commercial advertising and/or promotion. These advertisements actually deceived and/or had the tendency to deceive a substantial part of the audience for McDonald's messages.

39. McDonald's engaged in these false, deceptive and/or misleading descriptions of fact and/or misrepresentations of fact in commercial advertising and/or promotion nationwide and abroad, including in Georgia and in this District, and the effects of McDonald's acts throughout the United States were intended to and did injure the Class BK Franchisees, including in Georgia and in this District.

40. McDonald's misrepresented that each player in its promotional games had a fair and equal chance of winning high-value prizes and further misrepresented the specific odds of winning such high-value prizes.

41. McDonald's misrepresentations concerned McDonald's products, services and/or commercial activities.

42. The promotional games were inextricably linked to, and in some cases physically attached to, McDonald's products such as french fries and

soft drinks. The misrepresentations were material to their customers' decisions to patronize McDonald's restaurants and to purchase McDonald's products.

43. Moreover, each promotional game piece itself constituted a unique McDonald's product, and McDonald's expressly and/or implicitly misrepresented that players stood a fair and equal chance of winning the grand prize with each such piece.

44. All such misrepresentations took place in interstate commerce.

45. When McDonald's finally disclosed to the public that its games had been fixed for years, a McDonald's spokesman identified as one of McDonald's "top priorities" its "responsibility" to "return the money." McDonald's earned substantial windfall and "unnatural" profits as the direct and proximate result of falsely, misleadingly and/or deceptively advertising and promoting its fixed promotional games. An appropriate share of such profits to be demonstrated at trial should be returned to, and are lawfully due to the Plaintiff Franchisees as competitors injured by McDonald's false, misleading and/or deceptive advertising and promotion.

46. The BK Class Franchisees have also been damaged directly and proximately as a result of McDonald's false, misleading and/or deceptive advertising and unfair competition in an amount to be demonstrated at trial. Specifically, McDonald's actions have caused, *inter alia,* a diversion of

trade away from the Plaintiff Franchisees.

47. Evidence continues to mount that McDonald's conduct was intentional and/or sufficiently reckless over all or some of the period its games were rigged, above and beyond the conduct required for liability under § 43(a) of the Lanham Act, to subject McDonald's to treble damages or an award above McDonald's profits, pursuant to 15 U.S.C. § 35.

48. After learning that its games had been compromised sometime before August 2001, McDonald's knowingly and deliberately continued to advertise and promote its promotional games as though the games were fair.

49. Reactions in the industry to the scandal also included such concerns as McDonald's "disturbing lack of vigilance in the past." These observations and industry custom and practice reinforce that McDonald's knowingly and/or sufficiently recklessly failed to timely institute proper procedures to ensure the integrity of its games promotions. Even the "Blue Ribbon Panel of Advisors" which McDonald's subsequently appointed to review its promotional game security procedures rejected McDonald's long-time practice of "a single party overseeing game security." Here that "single party" for twenty years was Simon: not only a self-proclaimed "captive" of McDonald's, but the employer of the ringleader of the criminal scheme. And yet, McDonald's chose to settle its claims against Simon concerning the rigging of its games by *paying Simon* a settlement worth $16 million!

50. Upon information and belief, a prosecuting attorney for the United States also elicited sworn testimony in one of the criminal trials indicating that even though computer programs were supposed to randomly select where the big prizes would go, McDonald's was involved in rerunning some of these programs under suspect circumstances.

51. Upon information and belief, McDonald's responded to the original filing of this Complaint with the terse statement to the press that *"our* customers . . . [ha]ve moved on and so have we." (Emphasis added). This suit is intended to ensure that before "moving on," McDonald's returns to the Class BK Franchisees what they are rightfully due under the law from the wrongful and deceptive diversion of *their* customers.

DEMAND FOR JUDGMENT

WHEREFORE, Phoenix for itself and the Class BK Franchisees demand:

1. That this Court declare this Complaint as a proper class action pursuant to Rule 23 of the Federal Rules of Civil Procedure and certify the Class defined herein;

2. That this Court order McDonald's to disgorge an appropriate share of all profits associated with sales generated by the fixed promotional games;

3. That this Court award to Phoenix and the Class BK Franchisees their actual damages, in amounts to be demonstrated at trial for the harms directly and proximately caused by McDonald's

false, deceptive and/or misleading advertising, promotion and/or marketing;

4. That this Court award Phoenix and the Class BK Franchisees, treble the proof of actual damages and/or an award above McDonald's profits, pursuant to 15 U.S.C. § 35;

5. That this Court award Phoenix and the Class BK Franchisees, other damages incurred, including, but not limited to the costs of price reductions, promotions and other advertising costs incurred to respond to the fixed promotional games;

6. That this Court award Phoenix and the Class BK Franchisees, the costs and expenses they have incurred, including all reasonable attorneys' fees;

7. That this Court award Phoenix and the Class BK Franchisees, pre-judgment and post-judgment interest; and

8. That this Court grants Phoenix and the Class BK Franchisees, such other and further relief as the Court deems just and proper.

A TRIAL BY JURY IS DEMANDED FOR ALL ISSUES SO TRIABLE.

Respectfully submitted,

/s/ Irwin W. Stolz
Irwin W. Stolz (Georgia #683700)
WINBURN, LEWIS, BARROW & STOLZ
279 Meigs Street
Athens, Georgia 30601
Phone (706) 353-6585
Fax: (706) 354-1785
E-mail: *istolz@athens.net*
Attorneys for Plaintiff
Phoenix of Broward, Inc. on Behalf of Itself
and Similarly Situated Burger King® Franchisees

Of Counsel:

David C. Weiner (Ohio #0013351)
Charna E. Sherman (Ohio #0045862)
SQUIRE, SANDERS & DEMPSEY L.L.P .
4900 Key Tower
127 Public Square
Cleveland, Ohio 44114-1304
Phone: (216) 479-8500
Fax: (216) 479-8780
E-mail: dweiner@ssd.com
E-mail: cesherman@ssd.com

Walter Weir, Jr. (Pennsylvania #23137)
WEIR & PARTNERS LLP
The Widener Building, Suite 500
1339 Chestnut Street
Philadelphia, Pennsylvania 19107
Phone: (215) 665-8181
Fax: (215) 665-8464
E-mail: www@weirpartners.com